No. 2999

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EVA MAY GILL,
Appellant,

vs.

FILLMORE WHITE,
Appellee.

BRIEF FOR APPELLANT.

R. H. COUNTRYMAN,
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PERNAU-WALSH PRINTING CO.

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Statement of the Case.

Fillmore White, the bankrupt herein, is a dentist by profession. He is a graduate of the University of California and duly licensed to practice dentistry in the State of California (p. 7 Tr.). The bankrupt is approximately of the age of thirty-eight years. He graduated from the dental department of the University of California in the year 1898 and practiced his profession until the year 1907 when he became secretary of the Robert White Company, a corporation, engaged in the administration of the assets of the estate of Robert White, deceased, father of said bankrupt, at a salary of

$200 a month and held that position from 1907 to 1912 (p. 21 Tr.).

The Robert White Company owns a large amount of property. The bankrupt was the owner of 100 shares of stock in said company. On April 8, 1908, Helen B. White, wife of the bankrupt, received 124 shares of stock of said Robert White Company from said bankrupt, which shares were later cancelled (p. 22 Tr.).

On November 20, 1912, the bankrupt again transferred to Helen B. White, his wife, 125 shares of stock of the Robert White Company represented by Certificate 23 and representing his entire holdings in said company (pp. 21 and 22 Tr.).

On May 4, 1914, Emilie E. White, mother of bankrupt, commenced an action in the Superior Court of San Francisco against the bankrupt and his wife and attached said stock. Said action was brought to recover on a promissory note executed by the bankrupt and his wife (p. 22 Tr.). This note was for the sum of $10,000. The consideration of said note was that during the time the bankrupt was a student at the University of California, when he was living with his parents, his parents advanced to him from time to time small sums of money ranging from $5 to $10 and up to $100. His mother kept no account or memoranda of these amounts so advanced to the bankrupt and was unable to state by what process of mathematical computation the amount of $10,000, the purported amount named

in the note, was reached. The bankrupt graduated in the year 1898 and although something over sixteen years had elapsed no attempt had been made to obtain any promissory note or enforce any claim of the mother against the bankrupt until appellant obtained a judgment against the bankrupt (pp. 22 and 23 Tr.).

The note to Emilie White, the mother of the bankrupt, is dated August 1, 1914. On March 5, 1914, appellant creditor brought a suit in the Superior Court of San Francisco on a promissory note executed by the bankrupt, and judgment was rendered in favor of appellant in December, 1914.

Appellant is a widow. She resides in Sparks, Nevada. She has no knowledge of business. On March 20, 1912, Charles S. Laumeister, Peter P. Flood and Marshall W. Giselman bought certain shares of stock in the Reno Ruhl Gold Mining Company from W. J. Gill, the husband of appellant, and gave Mr. Gill a promissory note as part of the purchase price thereof (pp. 26 and 27 Tr.). On or about July 20, 1912, the bankrupt bought from Flood and Laumeister certain of these shares of stock and as a part consideration thereof agreed to pay the note to Mr. Gill (p. 27 Tr.).

On September 20, 1915, when this note became due, the bankrupt induced Mr. Gill to surrender the note of March 20, 1912, and to accept in lieu thereof a note executed by the bankrupt and Mr. Giselman and endorsed by Flood and Laumeister (p. 27 Tr.).

On November 13, 1912, being then on his deathbed, Mr. Gill endorsed and delivered the latter note to Mrs. Gill. Mr. Gill died on November 13, 1912. Mrs. Gill did not know the legal rules exonerating endorsers on promissory notes for failure to present the note for payment, or by granting extensions of time. The bankrupt took advantage of the ignorance of the law of Mrs. Gill and persuaded her to extend the time of payment on the note of September 12, 1912, and thereby legally released the endorsers thereon. The object of the bankrupt in obtaining this extension of time was to thereby enable him to cancel his indebtedness to Flood and Laumeister and prevent Mrs. Gill from obtaining her money from these two endorsers (pp. 27 and 28 Tr.).

The judgment in favor of Mrs. Gill is final and is wholly unsatisfied (p. 29 Tr.).

On May 4, 1915, Mrs. White, the mother of the bankrupt, brought suit on her promissory note and attached his stock in the Robert White Company (p. 22 Tr.). The bankrupt and his wife defaulted in the suit brought by the mother of the bankrupt and all of the stock in the Robert White Company was delivered to the mother in satisfaction of said amount due on said promissory note, and the further sum of $1500 paid by the mother of the bankrupt to the wife of the bankrupt (p. 24 Tr.). The only creditors of the bankrupt were members of his family, there being but a few claims against the bankrupt aggregating $100 (p. 29 Tr.).

The only property Mr. Gill had was the promissory note executed to him by the bankrupt and Marshall Giselman and endorsed by Flood and Laumeister.

The appellant desired to take the testimony of the wife of the bankrupt. On the advice of counsel, Helen B. White, the wife of the bankrupt, refused to be sworn. The bankrupt aiso objected to his wife being sworn, on the ground that the wife could not testify for or against her husband without his consent in any proceeding concerning the transfer of property to his wife, for the reason that any testimony that might be developed would be a privileged communication and not permissible under the federal statutes or the laws of the State of California (p. 25 Tr.). Mrs. Gill offered to prove that property of various kinds and character including the 125 shares of stock in the Robert White Company had been transferred by the bankrupt to his wife for the purpose of hindering, delaying and defrauding his creditors, and, particularly, Mrs. Gill (p. 29 Tr.).

The referee sustained these objections and Helen B. White was not required to testify. The referee would not even permit Helen B. White *to be sworn* as a witness (pp. 25-26 Tr.).

The bald facts are that the bankrupt bought some stock in a mining company from Flood and Laumeister and agreed as part of the purchase price to pay a promissory note given by Flood

and Laumeister to Mr. Gill. Mr. Gill died, and the bankrupt persuaded Mrs. Gill to legally waive any recourse against Food and Laumeister on their endorsement of the promissory note. Mrs. Gill brought suit against the bankrupt and obtained judgment. To evade the payment of this judgment the mother of the bankrupt obtained from the bankrupt and his wife a promissory note for amounts which were at least fourteen years old, and of which no record of any kind had ever been kept, simply being gifts of the parents of the bankrupt to the bankrupt during his college career. They went through the form of selling to the mother of the bankrupt all of the interest of the bankrupt in the corporation which represented the assets of his father's estate. This was done for the purpose of defrauding appellant. The bankrupt having induced Mrs. Gill to legally release Flood and Laumeister proceeded to evade payment of the note to her by selling his stock in payment of these long over-due amounts—amounts which the mother could not fix and of which she had no account. The creditor claims that the wife of the bankrupt not only holds shares in the Robert White Company belonging to the bankrupt, but also has other property of the bankrupt. The referee would not permit the wife even to be sworn as a witness.

It further appears that a short time before filing his petition in bankruptcy the bankrupt spent a sum of money in excess of $3000 in buying dental

instruments, library and in elaborately furnishing and equipping dental offices. These moneys were expended so that the bankrupt could claim the property of his office was exempt (p. 25 Tr.).

If the ruling of the referee is confirmed, there will be a very easy method provided for a bankrupt to defraud his creditors. All he will have to do will be to turn liquid securities over to his wife. When his wife is called to testify, the bankrupt will refuse his consent to his wife giving any testimony in the matter, on the ground that it violates confidential communications, and the wife either keeps or returns the securities to the bankrupt. We think that the mere statement of such a ruling is its own refutation.

Brief of the Argument.

1. A disclosure of the transfer of property from the husband to his wife is not a privileged communication in California and does not fall within the inhibition of Section 1881 of the C. C. P. of the State of California; Stats. of Cal., 1850-51, Section 395, p. 114;

Stats. of Cal., 1863-4, p. 771;

Sec. 1881, C. C. P., subdiv. 1, as originally enacted in 1872;

Sec. 1881, subdiv. 1, C. C. P., as amended; Stats. of Cal. 1907, p. 87;

Poulson v. Stanley, 122 Cal. 655;

Sharon v. Sharon, 79 Cal. 677;
Civ. Code of Cal., Sec. 158;
Civ. Code of Cal., Sec. 2224;
Brison v. Brison, 75 Cal. 529;
Brison v. Brison, 90 Cal. 330;
Bradley v. Bradley, 165 Cal. 237;
Meyers v. Reinstein, 67 Cal. 89;
Sedgwick v. Sedgwick, 52 Cal. 336;
Estate of McCausland, 52 Cal. 568;
Chase v. Evoy, 51 Cal. 618;
Satterlee v. Bliss, 36 Cal. 509;
Title Ins. & Trust Co. v. Ingersoll, 153 Cal. 1;
Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 473;
Yoakum v. Kingery, 126 Cal. 30;
Fanning v. Grant, 156 Cal. 279;
Estate of Niccolls, 164 Cal. 368;
Lenninger v. Lenninger, 167 Cal. 297;
Cullen v. Bisbee, 168 Cal. 695;
Pabst v. Shearer, 172 Cal. 239;
Killian v. Killian, 10 Cal. App. 312;
In re Carlin, 19 Cal. App. 168;
Eaton v. Locey, 22 Cal. App. 766;
Volquards v. Myers, 23 Cal. App. 500;
Giuffre v. Lauricella, 25 Cal. App. 422;
Brunner v. Title Ins. & Tr. Co., 26 Cal. App. 35;
Alexander v. Bosworth, 26 Cal. App. 589.

2. Nondisclosure of communications from husband to wife is confined strictly to confidential communications in all jurisdictions.

Jones on Evidence, Sec. 736;
Sackman v. Thomas, 24 Wash. 660; s. c. 64 Pac. 819;
French v. Ware, 65 Vt. 338; s. c. 26 Atl. 1096;
Hunt v. Eaton, 55 Mich. 362; s. c. 21 N. W. 429;
Chunot v. Larson, 43 Wis. 536; 28 Am. Rep. 567;
Hanks v. Van Garder, 59 Iowa 179; s. c. 13 N. W. 103;
Chesley v. Chesley, 54 Mo. 347;
Quade v. Fisher, 63 Mo. 325;
Crook v. Henry, 25 Wis. 569;
Sumner v. Cooke, 51 Ala. 521;
Robison v. Robison, 44 Ala. 227;
Mitchell v. Hughes, 24 Ill. App. 308;
Gifford v. Wilkins, 24 Ill. App. 367;
Sauter v. Scrutchfield, 28 Mo. App. 150;
Taylor v. Duesterberg, 109 Ind. 165;
Curry v. Stephens, 84 Mo. 442;
Blabon v. Gilchrist, 67 Wis. 38;
Degenhart v. Schmidt, 7 Mo. App. 117;
Teckenbrock v. McLaughlin, 25 Mo. App. 524-526;
Darrier v. Darrier, 58 Mo. 222;
Schmied v. Frank, 86 Ind. 250, 257;
O'Connor v. Hartford Fire Ins. Co., 31 Wis. 160, 166;
Crook v. Henry, 25 Wis. 569;
Southwick v. Southwick, 49 N. Y. 510;
Sedgwick v. Tucker, 90 Ind. 271;

Beitman v. Hopkins, 109 Ind. 179; 9 N. E. 720;
Hagerman v. Wigent, 108 Mich. 192; 65 N. W. 756;
Moeckel v. Heim, 134 Mo. 576; 36 S. W. 226;
Parkhurst v. Berdell, 110 N. Y. 386; 6 Am. St. Rep. 384;
Schaffner v Reuter, 37 Barb. (N. Y.) 44;
Wood v. Chetwood, 27 N. J. Eq. 311;
Edwards v. Dismukes, 53 Tex. 605.

3. Upon the transfer of any property from the bankrupt to his wife, the wife became the trustee of the bankrupt.

Dufour v. Weissberger, 172 Cal. 223;
Cooney v. Glynn, 157 Cal. 583;
Martin v. Lawrence, 156 Cal. 191;
Fagan v. Lentz, 156 Cal. 681;
Bollinger v. Bollinger, 154 Cal. 695;
Crabtree v. Potter, 150 Cal. 710;
Brison v. Brison, 75 Cal. 525;
Dieckmann v. Merkh. 20 Cal. App. 655;
Tench v. McMeekan, 17 Cal. App. 14;
Sanguinetti v. Rossen, 12 Cal. App. 623;
Chamberlain v. Chamberlain, 7 Cal. App. 634;
Noble v. Hutton, 7 Cal. App. 14.

4. Under the federal law, Helen B. White was a competent and compellable witness in any inquiry concerning the acts, conduct or property of her bankrupt husband.

In re Worrell, 10 Am. Bk. Rep. 744;
In re Hoffman, 28 Am. Bk. Rep. 680;
In re Foerst, 93 Fed. 190;
In re Thompson, 28 Am. Bk. Rep. 794;
In re Kesler, 35 Am. Bk. Rep. 30.

5. Fraudulent transfer of property by a bankrupt to his wife may be attacked although made more than four months prior to the bankruptcy.

In re Schenck, 116 Fed. 544;
In re Toothaker Bros., 128 Fed. 187; s. c. 12 Am. Bk. Rep. 100.

6. A bankrupt will be refused his discharge if he knowingly and fraudulently conceals his interest in any property.

In re Becker, 106 Fed. 754.

7. Dealings between near relatives should be scrutinized with care.

Remington on Bankruptcy, Secs. 556, 800, 854.

8. Repetitions of "I don't know" or "I don't remember" as to matters undoubtedly within the witness's knowledge or memory may indicate falsehood or fraud.

Secs. 558¾ and 1568 of Remington on Bankruptcy.

9. A mere tacit understanding between parties to work to a common and unlawful purpose is all that is necessary to constitute a conspiracy to

defraud; and it may be proved by circumstantial evidence even in the face of uncontradicted testimony.

Remington v. Bankruptcy, Secs. 558⅛, 558¼, 558¾, 856⅛, 856¼, 2648, 2649, 2650.

10. In the investigation of questions of fraud, great latitude is allowed in the admission of evidence.

Questions of fraud can scarcely ever be proved by direct evidence; hence the necessity for the admission of all the circumstances fairly connected with the transaction.

Remington on Bankruptcy, Secs. 856¾, 1209, 1213, 1496¼, 1496½, 1750, 1750½.

11. A bankrupt has no constitutional right to a discharge.

Sec. 2466, Remington on Bankruptcy.

12. Grounds for refusing a discharge in bankruptcy.

Secs. 346, 356 and 358, Brandenburg on Bankruptcy;

In re Feldstein, 115 Fed. 259; s. c. 22 Am. Bk. Rep. 160.

13. Debts to relatives should be in account books.

Sec. 2549½, Remington on Bankruptcy.

14. Evidence need not be pleaded.

In re Frice, 96 Fed. 611; s. c. 2 Am. Bk. Rep. 676.

15. Intermingling funds of wife with those of bankrupt held sufficient to bar a discharge.

Bragassa v. St. Louis Cycle Co., 107 Fed. 77.

16. If bankrupt conveys property to his wife in fraud of his creditors and omits same from the schedules he is not entitled to a discharge.

In re Skinner, 97 Fed. 190.

Argument.

The Statutes of 1850-51, to which reference is made, read as follows:

> "A husband shall not be a witness for or against his wife, nor a wife for or against her husband; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this provision does not apply to a civil action or proceeding by one against the other."

This section was amended so as to read as follows (Statutes 1863-4, p. 771):

> "A husband may be a witness for or against his wife, and a wife may be a witness for or against her husband, and where husband and wife are parties to any action or proceeding, they, or either of them, may be examined as witnesses in their own behalf, or in behalf of each other, or in behalf of any of the parties thereto, the same as any other witness; but this section shall not apply to cases of divorce, neither shall any husband or wife be competent or compellable to disclose any communication

made to him or her by the other during marriage."

Section 1881 of the Code of Civil Procedure contains the following preamble:

> "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:"

Subdivision 1 of Section 1881, C. C. P., as originally enacted, reads as follows:

> "A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other."

Subdivision 1 of Section 1888, C. C. P., was amended (Statutes 1907, p. 87) to read as follows:

> "A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage, or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other; or in an

> action brought by husband or wife against another person for the alienation of the affections of either husband or wife; or in an action for damages against another person for adultery committed by either husband or wife."

It will be observed that the object and purpose of section 1881, C. C. P., subd. 1, is to "encourage confidence and to preserve it inviolate" by permitting a husband or wife to make a "communication" to his or her spouse, without fear that such "communication" will be disclosed on the witness stand, subject to certain exceptions.

The delivery of a deed by a husband to his wife is not a privileged communication.

> Poulson v. Stanley, 122 Cal. 655.

An assignment of a claim by a husband to his wife is not a privileged communication.

> Hanks v. Van Garder, 59 Iowa 179; 13 N. W. 103.

In Sharon v. Sharon, 79 Cal. 677, it is said:

> "The burden is upon the party seeking to suppress the evidence to show that it is within the terms of the statute, and it must appear that the party learned the matter in question only as counsel, or attorney, or solicitor for the party, and not in any other way, and that it was received professionally, and in the course of business and communications made by a third party with a view to employ the witness as an attorney for the party, are not privileged as confidential, unless it be shown that such communications are authorized to be made by the party for whom such a person assumed to act;

> nor does the rule apply to conversations had between the attorney and a third party, or between the third parties in the presence of the attorney and client. The communications must be confidential, and so regarded, at least by the client, at the time. The presumption is that all communications between the attorney and client in the course of professional employment are confidential, but this is a presumption that may be rebutted, and if it clearly appears that the same were not intended by the client to have been confidential, it is not privileged."

The disclosure of a written communication from one spouse to another is as much within the inhibition of the section as the disclosure of an oral communication.

If opposing counsel is right in his construction of Section 1881, C. C. P., a written agreement between husband and wife would be inadmissible in evidence because of the inhibition of the section. The section draws no distinction between a written communication and an oral communication; therefore if the bankrupt's wife had made a written declaration of trust as to the shares of stock she held in the Robert White Company, this declaration of trust would have been rejected and refused admission in evidence.

If Mr. and Mrs. White had entered into a solemn written agreement, such written agreement would be inadmissible in evidence on the theory of appellee.

Section 158, Civil Code, reads as follows:

> "Either husband or wife may enter into any engagement or transaction with the other, or

> with any other person, respecting property, which either might, if unmarried, subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts."

If the contention of appellee is sound, neither husband nor wife may testify concerning an agreement made pursuant to Section 158 of the Civil Code, because such testimony would be the disclosure of a communication, either written or oral, from one spouse to another. It is evident that any agreement, written or oral, between the spouses relative to their property rights does not come within the word or term "communication", as used in Section 1881. Such agreements as to property rights, or the title to the property of the respective spouses, or the transmutation of the separate property of one spouse into community property, or of community property into the separate property of one of the spouses, are not inhibited "communications between the spouses.

Section 2224 of the Civil Code of California, reads as follows:

> "One who obtains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

The latest case in California, so far as we are at present advised, on the subject of confidential

communications between a husband and a wife is Savings Union Bank & Trust Company v. Crowley, decided by the Supreme Court of the State of California on November 23, 1917,

159 Pac. 194.

In its opinion therein, the court said:

> "The remaining point made by appellant is that the court erred in permitting respondent to testify to declarations of her husband concerning the delivery of the notes and certificates of stock to her, on the ground that by the law of this state neither spouse can, without the consent of the other, testify as to any communications made by one to the other during marriage, citing section 1881, subdivision one, Code of Civil Procedure. Respondent contends that no decision in this jurisdiction has extended the restriction beyond confidential communications, and by reason of the freedom of contract between husband and wife either should be allowed to testify freely to business communications. Section 1881 declares that the rule there stated excluding testimony by one spouse of declarations by the other made during marriage 'does not apply to a civil action or proceeding by one against the other.' The Civil Code (Sec. 158) provides that 'either husband or wife may enter into any engagements or transactions with the other, or with any other person, respecting property, which eight might if unmarried.' The protection of the right to contract with each other respecting their separate property requires that each should be allowed to testify concerning such contracts, in case of an action between them thereon. This is such an action or proceeding within the meaning of section 1881, and the prohibition therein does not apply. Under that section the wife can testify to communications made to her

> by her husband constituting the contract between them, or affecting her rights thereunder. Emmons v. Barton, 109 Cal. 669, was not a case of that character, and what is there said has no application here."

Such evidence is admissible in an action between the husband and wife where the plaintiff is claiming that the defendant made a certain contract or agreement, or held the property in trust under certain conditions, and either written or oral evidence of those conditions are admissible in the suit between the husband and wife.

The object and purpose of section 1881 is to prevent the introduction in evidence of communications between the spouses on the ground of public policy "to encourage confidence and to preserve it inviolate", but no confidence is discouraged or violated by evidence showing the condition of title to property, or by showing that the real title to property which is apparently vested in one spouse is really vested in the other spouse. No confidence is disturbed by showing the truth as to the condition of the title to real or personal property. No confidence is disturbed when one spouse testifies that by the agreement between him and his wife the title to real property which was apparently of record in her name is really the property of the husband.

The original rules of evidence prohibited any party from testifying for fear he would commit perjury on account of his interest in the transaction. Those rules have been entirely changed, and

now any party to an action may testify. The law no longer presumes or fears that parties to an action will perjure themselves.

Rules of evidence are enacted for the purpose of enabling courts in an orderly procedure to judicially ascertain the truth; they are not enacted as a shield to prohibit the presentation of the facts of the controversy, or to shut out the truth.

On the grounds of public policy there are certain privileged communications. Evidence of these communications, obviously, is refused because it is for the best interests of society that the disclosure of confidential communications between the various classes of persons specified in section 1881, C. C. P., should be denied. Section 1880, C. C. P., is enacted for the purpose of preventing fraud by prohibiting any party to a transaction to testify when he is the plaintiff in an action or has a claim against an estate, because the party against whom the claim is made cannot testify in opposition thereto, and fraudulent claims might be presented against the estates of deceased persons. In order to prevent the presentation of such fraudulent claims, section 1880 has been enacted, but that section never applies to cases where the plaintiff is claiming his own property on the theory that the deceased was a bailee or custodian, or trustee of the property, and that the real title thereto is vested in the plaintiff.

C. C. P., Section 1880, subdiv. 3, reads as follows:

> "Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person."

Lack of consideration for any contract may always be shown. As a husband and wife may deal with each other as to property rights in the same manner as if they were single, there is no reason why the same rules as to showing consideration or lack of consideration should not be adopted and followed and used in transactions and contracts between the husband and wife as in transactions between either spouse and a third person. When a husband and wife deal with each other as to property rights, they set at large all questions or privileged or "confidential" communications, and are subject to the same rules of substantive law, and of evidence, as are other parties engaged in contracts of a similar character. If this is not true, then a husband and wife may not contract with each other as to property rights in the same way as if they were single, but they may only so contract subject to the limitation as to the disclosure of confidential communications. But section 158 of the Civil Code makes no such limitation on their contractural rights, and we submit that no such limitation should be read into the section by judicial construction and interpretation.

Business communications between a husband and a wife are not confidential communications. In all business matters involving the property rights, the matrimonial partnership has no more evidentiary secrets than has any other partnership.

The object of an examination of the bankrupt and of witnesses is to enable creditors to find grounds of opposition to the bankrupt's discharge, if any exists, and to enable the trustee to discover assets of the estate which may be applied to the payment of the bankrupt's estate.

In re Horgan, 98 Fed. 414; s. c. 39 C. C. A. 118;

Under the bankruptcy law, an unlawful preference given within four months of the bankruptcy is vitiated by the adjudication of bankruptcy.

In re Gray, 3 Am. Bk. Rep. 647;
Fouche v. Shearer, 172 Fed. 592;
Henkel v. Seider, 162 Fed. 553.

Therefore, it is illogical to attempt to confine fraudulent transfers solely to the four months' preference period. We think a fraudulent transfer of property made four months before the adjudication of bankruptcy is not validated, and the fraud is not removed, by the four months' limitation of time. It is a cardinal rule that fraud vitiates all things. It cannot be, and we think never was, the intention of the Bankruptcy Act to permit a bankrupt to fraudulently transfer his property, and wait four months and one day, and

then file a petition in bankruptcy and obtain an adjudication, and thereby deprive his creditors of the property fraudulently transferred, or prevent the creditors from investigating to ascertain the circumstances and conditions under which the fraudulent conveyance was attempted to be made by and between the bankrupt and his fraudulent grantee or transferee.

In the case at bar, we are not able to definitely state whether the transfers to Helen B. White, wife of the bankrupt, were made within four months of the bankruptcy. Our position is that the four months' period is a false quantity; that if a transfer was fraudulently made, it is not validated by the mere lapse of four months of time before the adjudication of bankruptcy, and, therefore, we assert *arguendo* that it is immaterial, in this discussion, whether or not the fraudulent transfer from the bankrupt to his wife was made within the four months' preference period or prior thereto. The act does not permit an illegal preference to be made within four months of the bankruptcy. If an attempted preference is fraudulently made the element of time is immaterial, unless within the statute of limitations of the State of California, which does not limit an action for relief on the ground of fraud until three years after the discovery of the fraud by the aggrieved party.

In re Pease, 129 Fed. 446.

Section 338, subdivision 4 of the C. C. P. reads:

"Within three years:

"4. An action for relief on the ground of fraud or mistake. The cause of action in such case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

Judson v. Lyford, 84 Cal. 505.

Dated, San Francisco,
February 13, 1918.

R. H. COUNTRYMAN,
Attorney for Appellant.